Supreme Court, U. S.
FILED
DEC 20 1979
MICHAEL RODAK, JR., CLERK

No. 79-686

In the Supreme Court of the United States

OCTOBER TERM, 1979

LUTHER G. POWER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. App. A-1 to A-26) is reported at 597 F. 2d 258. An earlier, related opinion of the Court of Claims (Pet. App. C-1 to C-16) is reported at 531 F. 2d 505.

JURISDICTION

The judgment of the Court of Claims was entered on April 18, 1979. A petition for rehearing was denied on June 29, 1979 (Pet. App. B-1). The petition for a writ of certiorari was filed on September 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether a federal employee who establishes in the Court of Claims that his discharge from federal service was improper, but who, in the course of the proceedings,

waives his request for reinstatement to federal service, is entitled to back pay for any period after the time that he waived reinstatement.

2. Whether, under the Back Pay Act, the United States may offset the amount of pay that a discharged employee might, with reasonable effort, have earned through other employment in calculating the employee's award of back pay.

STATEMENT

1. On September 18, 1972, petitioner was removed from his GS-9 position as an ammunition inspector at the Red River Army Depot, Texarkana, Texas. The removal was based on a charge that petitioner had submitted a false voucher for reimbursement of expenses relating to his transfer from New Mexico to Texas in May 1971. Specifically, the Army charged that petitioner had, among other things, submitted a claim of $175 for temporary lodging in May 1971, although the expenditure was in fact $125, and that he had submitted an improper claim for meals for his wife in May 1971, although his wife was not entitled to such reimbursement. These charges were sustained by a Civil Service Commission hearing examiner. Petitioner's discharge was upheld by the Commission's Board of Appeals and Review on April 5, 1974 (Pet. App. A-3 to A-4).

Petitioner then filed this suit in the Court of Claims, seeking reinstatement and back pay. On cross-motions for summary judgment, the Court of Claims concluded (Pet. App. C-5 to C-6):

> In the instant case, there is sufficient evidence to support the administrative determination of guilt despite some doubts raised by various facts in the record. Thus plaintiff's removal cannot be upset based on defendant's failure to prove guilt.

Nevertheless, the court held that the discharge should be overturned because "the maximum penalty imposed on plaintiff is clearly too harsh and out of all proportion" (*id.* at C-12). Accordingly, the court entered judgment for petitioner and remanded to its trial division to determine the amount of back pay to be awarded (*id.* at C-16). The court also stated, however, that "reinstatement in this action [is inappropriate] in light of the unusual nature of this case" (*ibid.*).

Petitioner did not apply for rehearing on the denial of his request for reinstatement. The government, however, sought rehearing on the question whether petitioner was entitled to receive back pay in the absence of an order reinstating him. In his opposition to this motion, petitioner expressly noted, without objection, that the court had determined "not to order reinstatement in this action" (*id.* at C-6).[1] On June 25, 1976, the Court of Claims denied the government's motion for rehearing, stating that (Pet. App. D-1 to D-2):

> [i]n denying rehearing *en banc* the court emphasizes that it deems that plaintiff, in his opposition to the defendant's petition for rehearing *en banc* and for rehearing, has rejected the position that he had to be reinstated, and the court concludes that he is content with the relief he has been accorded.

At no point in the subsequent proceedings to determine petitioner's back pay award did petitioner seek reinstatement to his former position or challenge the court's prior determination not to reinstate him.

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[1] Plaintiff's Response to Defendant's Motion for Rehearing at 7-8 (filed May 20, 1976).

2. After a trial on the issue of back pay, the Court of Claims awarded petitioner $51,928.44 (Pet. App. A-26). The court concluded that petitioner was entitled to back pay for the period from September 18, 1972 (the date of his discharge) to June 25, 1976 (the date on which the court denied the government's petition for rehearing). The court held, however, that petitioner could not "recover further back pay [after the latter date on which] he affirmatively rejected reinstatement" (Pet. App. A-8). The court also ruled that, because petitioner failed to make a reasonably diligent effort to obtain employment following his discharge, the United States is entitled to set off from the back pay award the amount that petitioner would have earned "by seeking and obtaining employment at the [national] minimum wage" (*id.* at A-22).

ARGUMENT

1. The Court of Claims held that a discharged federal employee who establishes that his discharge was improper, but who waives any right to reinstatement, is not entitled to back pay for any period of time after the waiver. The holding in this case is correct and is not in conflict with the decisions of this Court or any court of appeals. Further review is not warranted.

Under the Back Pay Act, an employee may receive back pay only "for the period for which the [unjustified discharge or other such] personnel action was in effect." 5 U.S.C. 5596(b)(1). The Court of Claims correctly concluded that back pay may not be awarded to petitioner for any period after June 25, 1976, because an unjustified discharge is not "in effect" after an employee waives his request for reinstatement and elects a

retrospective award of back pay.[2] Any other construction of the Act would allow a claimant to obtain back pay indefinitely in circumstances (such as here) where the discharge was improper but reinstatement is inappropriate as an equitable remedy.[3] Congress could not have intended such a result.

2. Petitioner contends (Pet. 20-22) that the Court of Claims erred in holding that the government is entitled to set off from his back pay award the amount that petitioner could, with reasonable diligence, have earned from other employment at the national minimum wage after his discharge. Petitioner argues that the government is entitled instead to set off only those amounts *actually* earned by a discharged employee from other employment.

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[2]Petitioner argues that, although he may have waived his request for reinstatement, he did not waive his claim for indefinite, prospective back pay (Pet. 14). But, as the court below held, *because* petitioner waived his right to reinstatement, he is not entitled to further back pay. After petitioner waived his request for reinstatement, he became "legally disqualified" from receiving future emoluments of the position. *United States* v. *Testan*, 424 U.S. 392, 402 (1976).

[3]We know of no other case addressing the question that petitioner has raised. None of the cases cited by petitioner (Pet. 10-13) involved a discharged employee's waiver of reinstatement. In *United States* v. *Wickersham*, 201 U.S. 390 (1906), for example, the discharged employee "stated his readiness to discharge the duties of the office." *Id.* at 393. The Court held that, because he was "ready and willing" to perform his official duties, the employee was entitled to compensation. *Id.* at 400. The Court did not address the question of back pay for the period following the waiver of a request for reinstatement. In *Ainsworth* v. *United States*, 399 F. 2d 176, 183 (Ct. Cl. 1968), the Court of Claims also expressly reserved the back pay question "which may arise if an employee is not reinstated at any time."

The Back Pay Act contains an express provision authorizing a set off for actual earnings. 5 U.S.C. 5596(b)(1). The Court of Claims has ruled that

> the clearest implication that can possibly be drawn from the language used, is that it was contemplated that the claimant would make a reasonable effort to secure other employment [after the final administrative action separating him from service] and that the amount which the claimant earned, *or with reasonable effort might have earned*, be deducted from the total amount of compensation that would otherwise be paid under the statute.

Schwartz v. *United States*, 149 Ct. Cl. 145, 147 (1960) (emphasis added).[4] To hold that the statute limits the offset to amounts actually earned, and bars offset when an individual chooses not to obtain other employment during the pendency of court proceedings, would reward sloth, would be contrary to ordinary principles requiring the mitigation of damages, and would place a premium on delay in litigation. The Court of Claims correctly viewed these results as contrary to the intent of Congress in enacting the Back Pay Act (Pet. App. A-14 to A-23).

[4]In the present case, the Court of Claims ruled that petitioner, a skilled mechanic, could at least have earned the minimum wage from April 6, 1974 to June 25, 1976 (Pet. App. A-22). Petitioner does not seriously dispute this (Pet. 21-22). The court refused to impose a duty on petitioner to seek alternative employment during the pendency of the administrative proceedings (Pet. App. A-19 to A-20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1979

DOJ-1979-12